

## CEPANI's checklist for remote hearings

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20 April 2021

*This checklist is inspired by the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic of 9 April 2020 (Annex I: Checklist for a Protocol on Virtual Hearings); HKIAC Guidelines for Virtual Hearings, May 2020; VIAC Protocol: A Practical Checklist for Remote Hearings, June 2020; the Seoul Protocol on Video Conferencing in International Arbitration, June 2020; CI Arb's Guidance Note on Remote Dispute Resolution Proceedings by CI Arb, June 2020 and Videoconferencing and Virtual Hearings Guidelines 2020 of the NAI, November 2020.*

### **1. GENERAL**

- Record the parties' agreement on holding a remote hearing. When there is no agreement, identify the legal basis for holding such hearing  
Provide for special rules in terms of reference (procedure, digital meetings).
- Verify domestic laws and regulations on the validity and enforceability of remote hearings
- Confirm the place of arbitration or determine it  
The fact that participants are located in different places does not affect the place of arbitration.

### **2. AT THE CASE MANAGEMENT CONFERENCE**

- Discuss with the parties and in time the organization of the remote hearing and, in particular, its particularities.
- Select platform  
Choose a platform; consider visual and audio quality, screen sharing, breakout rooms, recording function, chat function, technical assistance, simultaneous transcription and translation services etc.
- List attendees  
Note and communicate contact details (e-mail address) of each participant to other participants.
- Schedule a time and timetable for the remote hearing  
Parties should be treated equally and given a full opportunity to present their case during the remote hearing, in light of the issues to be discussed.  
Consider the issues to be discussed at the remote hearing.  
Consider relevant time zones, shorter hearing days/examination for experts and witnesses and breaks.
- Exchange documents to be presented by each party

Each party should list and communicate the documents presented during the remote hearing to the arbitral tribunal and the other party(ies).

- Recording  
Determine whether the arbitral tribunal and/or the participants may record the remote hearing.
- Discuss and establish a Cyber-Protocol  
The Cyber-Protocol should address (i) applicable data privacy regulations, (ii) confidentiality and (iii) the requirements to safeguard the security of the remote hearing against hacking, illicit access etc. It should be signed by the arbitral tribunal and the parties before the remote hearing.  
This protocol can be included in, or attached to, the Terms of reference.
- Discuss the need for participants to follow tutorials  
If needed, make the tutorial(s) about the technology used in the remote hearing available.
- Organize a test run  
This test is to ensure the connectivity of each participant as well as visual and audio quality and allow participants to test the platform's functions (such as screen sharing). Such test is advisable for complicated software. It shall be organized within the week preceding the remote hearing.  
During the test run, the online etiquette rules shall be discussed (identification of speakers; muting; raising virtual hand).

### **3. AT THE DRAFTING OF THE TERMS OF REFERENCE**

CEPANI recommends to insert, in the Terms of Reference, some language providing that the arbitration hearing "can be held through any appropriate means of communication" (article 24(3) of the 2020 CEPANI Arbitration Rules).

### **4. PROCEDURAL ORDERS**

CEPANI recommends to insert in a procedural order some language dealing with the organisation of a virtual hearing (see Annex II) and some language on confidentiality, privacy and security (cyber-protocol, see Annex III).

### **5. AT THE BEGINNING OF THE HEARING**

- Verify the presence of each authorized participant
- Request everyone to show the room in which they are  
This is necessary for witnesses as well as parties, to ensure that the confidentiality of the hearing is being respected.

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- Verify whether parties have technical assistance available in case technical difficulties arise
- Explain clearly how the session will be divided up (pleadings; Q&A)

### **For convenience: online etiquette rules**

- Ask parties to mute whenever not speaking
- Ask parties to raise virtual hand, if possible, when requesting to speak



**ANNEX I**

**SUGGESTED CLAUSES FOR TERMS OF REFERENCE ON DATA PROTECTION**

“The Parties, their representatives and the members of the Tribunal shall comply with all applicable data protection and privacy regulations when handling personal data in connection with, or arising from, the conduct of this arbitration. In particular, they shall ensure that they have a valid lawful basis for their respective processing activities, including when producing or otherwise sharing personal data with the other participants in these arbitral proceedings or external third parties.

The Parties, their representatives and the members of the Tribunal agree that where soft copy documents are transferred using physical media (e.g., USB or portable hard drives), the media must be encrypted and password protected, with the password provided to the other recipients by separate means.”

## **ANNEX II**

### **SUGGESTED CLAUSE FOR PROCEDURAL ORDERS DEALING WITH THE ORGANISATION OF A VIRTUAL HEARING** (Participants, see ICC Guidance of 9 April 2020).

"The tribunal confirms and directs that the hearing scheduled for *(insert date and time)* shall be conducted by videoconference.

Based on the information currently provided by the parties, the following participants ("**Participants**") shall take part in the hearing from the locations specified herein below:

**a. Claimant**

*(List names and log-in location(s) and point of connection)*

**b. Claimant's Counsel**

*(List names and log-in location(s) and point of connection)*

**c. Respondent**

*(List names and log-in location(s) and point of connection)*

**d. Respondent's Counsel**

*(List names and log-in location(s) and point of connection)*

**e. Tribunal**

*(List names of members of the tribunal and their location(s) and point of connection)*

**f. Witnesses / Experts / Transcription Provider / Support Staff & Technicians / Other participants (as applicable)**

*(List names and log-in location(s) and point of connection)*

Each Participant will promptly notify, by email communication circulated to all Participants, any change to their log-in location or connection details."

### **ANNEX III**

#### **SUGGESTED CLAUSE FOR PROCEDURAL ORDER DEALING WITH CONFIDENTIALITY, PRIVACY AND SECURITY** (cyber-protocol, see ICC Guidance Note of 9 April 2020).

"As a matter of principle, attendance at the hearing will be restricted to the Participants identified in this PO No. \_\_\_\_\_ or in accordance with its terms. For the avoidance of doubt, any technical consultants/support staff working with the Participants to facilitate the conduct of the hearing shall also be considered to be attending the hearing and shall be identified as Participants. In the event that a party wishes any other person to attend any portion of the hearing, it shall raise a request well in advance with the reasons such attendance is necessary or desirable. The parties shall attempt to reach agreement on such requests, failing which the tribunal shall decide whether to authorise the request.

No recording of any part of the hearing (including the audio track) may be made unless authorised in advance by the tribunal. An audio recording of the hearing shall be made by the stenographers retained for the purposes of preparing a common transcript. Any other proposed recording shall be requested at least 48 hours in advance of the relevant portion of the hearing.

In any event, the official record of the hearing shall be the written transcript as corrected or commented upon by the parties.

The parties are responsible for jointly considering and raising well in advance of the hearing (no less than two weeks) any laws applicable at the location of any Participant that may present an obstacle or issue of legal compliance with privacy, confidentiality, data protection and security requirements. After consulting the parties, the tribunal shall decide on what measures, if any, to take to address any applicable privacy and security requirements or standards that may impact the access or connectivity of any of the Participants.

In the event that any party considers that further security measures are required to safeguard the integrity of the hearing or reduce the risk of cyber attacks, infiltration or unauthorised access to the hearing, that party must raise such concerns immediately upon learning of the reason for such concerns. After consulting the parties, the tribunal shall decide what further measures, if any, shall be taken in this regard."